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In the

Supreme Court of the United States

OCTOBER TERM, 1925

No. 194

OLD COLONY TRUST COMPANY, as Trustee,
Appellant

vs.

THE CITY OF SEATTLE, COUNTY OF KING, W. W. SHIELDS, as Treasurer, and MATT STARWICH, as Sheriff, of King County,
Appellees

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WASHINGTON

Brief of Appellant

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SUBJECT INDEX

	Page
Statement of Case	1- 4
Statement of Facts	3-18
Specifications of Error	8
Argument	8-24
District Court erred in dismissing suit for want of jurisdiction in the Court as a Federal Court	8-24
1. Because the Eleventh Amendment was not applicable	8-17
2. The State was not a party to the record nor a necessary party to the suit	8- 9
3. The suit was not one to enjoin the collection of a State tax. It was one against the County and City and certain individuals to prevent illegal threatened acts causing irreparable injury to appellant and its trust property	8-18
4. Federal jurisdiction existed to determine whether appellant's rights under the State law were being violated	9
5. Seizure and sale of the mortgaged property to satisfy taxes upon street railway property would have been enjoined in the Courts of the State	14-15
6. The Eleventh Amendment does not afford immunity to violators of the laws of a State. The District Court as a Federal Court had full jurisdiction of the suit	9-17

INDEX OF CASES

A

Allen v. Baltimore & Ohio R. R. Co., 114 U. S. 311	11
Atwood v. Weems, 99 U. S. 183	21
Ayers, In re, 123 U. S. 443, 500, 501	12

B

Bennett v. Hunter, 9 Wall. 326	21
Board of Liquidation et al. v. McComb, 92 U. S. 531, 541	11

Pag

Bollong v. Corman, 125 Wash. 441, 442 ---- 2
Bromwell B. & W. G. Co. v. State Board, 279 Fed. 440, 442, 443, 444 ---- 1
Burgert v. Caroline, 31 Wash. 62, 66 ---- 2

C

Childs v. Smith, 51 Wash. 457, 461 ---- 2
Clifford v. Miller, 288 Fed. 537 ---- 11
Constitution of Washington, Article II, Section 26 ---- 13
Cooley on Taxation (3d Ed.), p. 808 ---- 20

D

Dunsmuir v. Port Angeles Company, 30 Wash. 586, 593 ---- 23

E

Ex parte Young, 209 U. S. 123 ---- 12

G

Goodsell v. Spokane County et al., 35 Wash. Decs. 476, August 26, 1925 (not yet officially reported) ---- 14

H

Helphrey v. Strobach, 13 Wash. 128 ---- 22
Hills v. Exchange Bank, 105 U. S. 319 ---- 21
Hopkins v. Clemson College, 221 U. S. 636, 642, 643 ---- 9, 17

I

Illinois Central R. Co. v. Adams, 180 U. S. 28, 37 ---- 17, 24
In re Ayers, 123 U. S. 443, 500, 501 ---- 12
In re Tyler, 149 U. S. 164 ---- 12

J

Johnson v. Lankford, 245 U. S. 541, 545 ---- 10
Johnson v. Martin, 83 Wash. 375 ---- 23

L

Page

Leet v. Armbuster, 143 Cal. 663 ---- 21
Lincoln County v. Luning, 133 U. S. 529 ---- 10
Livieratos v. Commonwealth Security Co., 57 Wash. 376 ---- 22
Ludwig v. Western Union Tel. Co., 216 U. S. 146 ---- 12

M

Memphis Railroad v. Dow, 120 U. S. 287, 301, 302 ---- 23
Mills v. Thurston County, 16 Wash. 378 ---- 15
Minshull v. Douglas County, 234 Pac. Rep. 661, April 3, 1925 (not yet officially reported) ---- 15
Moody v. Isselstein, 106 Wash. 294 ---- 23
Murray v. O'Brien, 56 Wash. 361 ---- 23

N

Netherlands-American Bank v. Grafke, 100 Wash. 188, 195 ---- 23
Northern Pacific Ry. Co. v. Franklin County, 118 Wash. 117 ---- 22

P

Packwood v. Briggs, 25 Wash. 530, 538 ---- 23
Pennington v. Yakima County, 127 Wash. 538, 540 ---- 14
Pennoyer v. McConnaughy, 140 U. S. 1, 10 ---- 11
Poindexter v. Greenhow, 114 U. S. 270, 282, 283, 297, 299 ---- 10, 21
Port of Seattle v. Oregon & W. R. R., 255 U. S. 56, 71 ---- 10, 17
Puget Sound Power & Light Company v. King County et al., 254 U. S. 22 ---- 5
Puget Sound Power & Light Company v. King County et al., 117 Wash. 351, 353, 358 ---- 5
Puget Sound Power & Light Company v. Seattle et al., Fed. Rep., Vol. 5 (2d Ed.) 393 ---- 5
Puyallup v. Lakin, 45 Wash. 368 ---- 14

R

Raymond v. King County, 117 Wash. 343 ---- 14
Remington's Compiled Statutes of Washington, Sec. 886 ---- 13

Page

Remington's Compiled Statutes of Washington, Sections 11319-11323 ..... 25, 26, 27
Rolston v. Missouri Fund Commrs., 120 U. S. 390, 411 11
Royall v. Virginia, 116 U. S. 572, 575 21

S

Scandinavian-American Bank v. King County, 92 Wash. 650 15
Scott v. Donald, 165 U. S. 58, 67, 68-70 12

T

Tacey v. Irwin, 18 Wall. 549 21
Tindall v. Wesley, 167 U. S. 204 10
Twichell et al. v. Seattle et al., 106 Wash. 32 4
Tyler v. Dane County, 289 Fed. 843, 847 ..... 12, 17
Tyler, In re, 149 U. S. 164 12

U

United States v. Lee, 106 U. S. 196 21
University State Bank v. Steeves, 85 Wash. 55, 59 23

W

Walter v. Northeastern R. R. Co., 147 U. S. 370, 374 17
Ward v. Love County, 253 U. S. 17, 21, 22, 23 17
Ward v. Thorndyke, 65 Wash. 11 22
Weiland v. Pioneer Irrigation Co., 238 Fed. 519 12
Weinberg v. Naher, 51 Wash. 591 22
Western Union Tel. Co. v. Andrews, 216 U. S. 165 12
Weyman-Bruton Co. v. Nash, 231 Fed. 898 12
Wilberg v. Yakima County, 132 Wash. 219, 220 15
Wingert v. First National Bank, 223 U. S. 670 23
Woodruff v. Trapnall, 10 How. 190 21

Y

Young, Ex parte, 209 U. S. 123 12

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APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WASHINGTON

Brief of Appellant

(Italics are Counsels' unless otherwise stated.)

STATEMENT

This appeal is from a decree of the District Court of the United States for the Western District of Washington, dated June 26, 1924, dismissing appellant's suit against appellees on the sole ground of

want of jurisdiction in the district court as a federal court because prohibited from exercising such jurisdiction by the Eleventh Amendment to the Constitution of the United States. (R. 20-25.)

The suit was dismissed on motion prior to answer. (R. 20.) The relevant facts well pleaded in the original and supplemental bills were therefore admitted. The requisite diversity of citizenship existed, appellant being a corporation created under the laws of the State of Massachusetts and appellees being two municipal corporations created under the laws of the State of Washington and two individual citizens and residents of Washington, both being officers of King County and one *ex-officio* collector of city taxes for the City of Seattle. (R. 2.) The amount involved exceeded the jurisdictional requirement. The principal of the city tax alone was $179,365.76. (R. 3.)

The suit was instituted by appellant as mortgagee trustee to prevent appellees, by fraud and collusion and in violation of the laws of the state, committing a threatened tort which if consummated would create a cloud upon the title to the property covered by such mortgage executed to appellant as trustee by Puget Sound Power & Light Company; dissipate the trust property used in serving the public and cause irreparable damage to appellant and the beneficiaries of the trust. (R. 1-6.)

Appellant assigned error in the decree (R. 1-6, 10-15) in dismissing the suit for want of federal jurisdiction; appealed directly to this court, obtained an order allowing its appeal stating that the suit was dismissed for want of jurisdiction in the district court as a federal court and duly preserved the jurisdictional question by the proper certificate. (R. 21-25.)

Statement of Facts

The tort which the bill alleged appellees combined to commit and were threatening to accomplish when the original bill was filed was the illegal repudiation by the city of its obligation to pay to its co-defendants its stipulated portion of the taxes upon the street railway property for the year 1919 which the city by its contract of purchase with Puget Sound Light & Power Company, a Massachusetts corporation, hereinafter designated "company," assumed and agreed to pay and which had been adjudicated by this Court and the Supreme Court of the state to be valid liens thereon; the fraudulent, arbitrary and illegal refusal of the other appellees to enforce such liens upon the street railway property or against the city and instead the fraudulent, arbitrary and illegal distraint by them of the property covered by appellant's mortgage on which all taxes had been paid; the threatened

sale of the same and the illegal application of the proceeds of sale to the extinguishment of the adjudicated tax liens upon the street railway property in order that the city and its street railway property should thereby escape their adjudicated obligations. (R. 1-6.)

The contract of purchase between the company and the city contained the following provision:

"That state, county and municipal taxes levied against the property for the year 1919 shall be paid, before the same shall become delinquent, by the respective parties hereto, in amounts proportional to the respective periods of time that said parties are respectively in possession of said property during the year 1919." (R. p. 3.)

The contract was held valid by the Supreme Court of the state. (R. p. 2.) (*Twichell et al. v. Seattle et al.*, 106 Wash. 32.) The instrument conveying the street railway property to the city contained the following provision:

"It is also further agreed between the parties hereto that if at the time of the delivery of this deed any lien shall have attached to the property or any part thereof, for the year 1919, for any tax for the year 1919, such lien shall not constitute a breach of warranty and that if such tax shall become collectible the same shall be paid before the same shall become delinquent by the respective parties hereto in the amounts proportionate to the respective periods of

time that said parties are respectively in possession of said property during the year 1919." (R. 3.)

The city was in possession three-fourths of the year 1919 and the company one-fourth. (R. 3.) The taxes for the year 1919 were adjudicated to be valid liens on the property when purchased by the city. (R. 5.)

Puget Sound Power & Light Company v. King County et al., 264 U. S. 22;

Puget Sound Power & Light Company v. King County et al., 117 Wash. 353;

Puget Sound Power & Light Company v. Seattle et al., Fed. R. Vol. 5 (2d) 393.

As a part of the scheme entered into by the appellees the County Treasurer refused to allow the company, mortgagor, to pay any portion of the taxes upon the street railway property less than the whole amount of all of the taxes with interest thereon. (R. 4.) After the filing of the bill and the service of process and before the application for the temporary injunction prayed for in the bill could be heard, the Sheriff made demand upon the company for the payment of the full amount of each and all of the taxes with interest and costs. He refused to allow the company to pay any single tax with interest and costs and refused to allow the company to pay any lesser sum than the full amount of all of the taxes with interest and costs. He then instead of distraining the

street railway property to satisfy the taxes thereon, distrained the mortgaged property covered by the appellant's mortgage and advertised the same for sale to satisfy the taxes upon the street railway property. (R. 12.) Appellant having applied to the court for leave to file a supplemental bill, filed such supplemental bill in which it alleged the action of the Sheriff since the institution of the suit, the refusal of the Sheriff to accept from the company payment of any of the taxes with interest thereon and costs less than the full amount of all taxes with interest and costs and the distraint and threatened sale by the Sheriff of the property mortgaged to appellant, trustee, as security for the payment of obligations issued by the company and outstanding in the hands of the public. It also alleged that such property was used in serving the public and that if the Sheriff were not restrained from selling it the mortgaged property would be dissipated; the security of appellant impaired and appellant and the beneficiaries of the mortgage security irreparably injured and damaged. It also alleged the willingness of the appellant to pay any portion of the taxes which the court should decree it or the company should pay and prayed that if compelled to make payment to protect its security it should be decreed subrogation. (R. 10-15.) Appellees moved to dismiss and the court upon hearing such motion

dismissed the suit for want of jurisdiction in the court as a federal court because of the prohibition contained in the Eleventh Amendment. (R. 20.)

Specifications of Error

Appellant for the reversal of the decree appealed from specifies and relies upon the following errors therein:

1. Dismissing the suit for want of jurisdiction in the court as a federal court.

2. In holding that the Eleventh Amendment to the Constitution of the United States prohibited the court from exercising federal jurisdiction in the suit.

3. In holding that four separate and distinct taxes for State, County, School District and City purposes could by appellees be consolidated in a lump sum and thereby the indirect interest of the state in one tax for state purposes deprive the court of federal jurisdiction in respect to the other taxes.

Argument

The District Court erred in holding that the State of Washington had any such interest in the suit as made the Eleventh Amendment to the Constitution of the United States applicable and deprived the District Court of jurisdiction as a federal court. (Specifications 1, 2.)

Neither the state nor any state officer was a party. The suit was by a Massachusetts corporation against two Washington municipal corporations and two resident citizens of Washington, officers of such corporations. The object of the suit was the prevention of irreparable damage to appellant through the fraudulent and collusive acts of appellees in violation of the law of the state. Appellant's controversy was not with the state. It was with appellees. If their acts were authorized by the state they could show such authority as a defense upon the merits. Neither the existence or nonexistence of authority presents a question of federal jurisdiction. The determination of such question is one involving the merits. Where the requisite diversity of citizenship exists and the amount involved is sufficient federal jurisdiction exists to determine whether the acts of appellees were lawful or unlawful. The only color for claiming that the state had even an indirect interest in the suit

was the fact that if the taxes upon the street railway property should be collected the Sheriff would pay such amount to the County Treasurer and he would pay a portion into the state treasury and the remainder to the County of King, School District No. 1 and the City of Seattle. Neither the original nor the amended bill sought any relief against the state or any state officer, nor did it seek to enjoin the collection of any tax upon the street railway property. The Eleventh Amendment therefore did not apply.

"Immunity from suit is a high attribute of sovereignty—a prerogative of the state itself—which cannot be availed of by public agents when sued for their own torts. The Eleventh Amendment was not intended to afford them freedom from liability in any case where, under color of their office, they have injured one of the state's citizens."

> *Hopkins v. Clemson College*, 221 U. S. 636, 642, 643.

The following language of this court is quite applicable to the case at bar:

"The sole question for our consideration then, is whether the cause of action stated is one against the state of which the district court has no jurisdiction. There is certainly no assertion of state action or liability upon the part of the state, and no relief is prayed against it. *The charges are all against Lankford.* The relief sought *is against him* because of his wilful or negligent *disregard of the laws of the state.*

"We think the question, therefore, should be answered in the negative; that is, *the action is not one against the state.* To answer it otherwise would be to assert, we think, that whatever an officer does, even in contravention of the laws of the state, is state action, identifies him with it and makes the redress sought against him a claim against the state and therefore prohibited by the Eleventh Amendment. Surely, an officer of a state may be delinquent without involving the state in delinquency; indeed, may injure the state by delinquency as well as some resident of the state, and be amenable to both."

Johnson v. Lankford, 245 U. S. 541, 545.

"The thing prohibited by the Eleventh Amendment is the exercise of jurisdiction in a 'suit in law or equity commenced or prosecuted against one of the United States by citizens of another state, or by citizens or subjects of any foreign state.' Nothing else is touched; and suits between individuals, unless the state is a party, in a substantial sense, are left untouched, no matter how much their determination may incidentally and consequentially affect the interests of a state, or the operations of its government."

Poindexter v. Greenhow, 114 U. S. 270, 297;

Port of Seattle v. Oregon & W. R. R., 255 U. S. 56, 71;

Lincoln County v. Luning, 133 U. S. 529;

Tindall v. Wesley, 167 U. S. 204.

"It is next contended that this suit cannot be maintained because it is in effect a suit against the state, which is prohibited by the Eleventh Amendment to

the Constitution of the United States, and Louisiana v. Jumel, 107 U. S. 711, is cited in support of this position, but this case is entirely different from that. There the effort was to compel a state officer to do what a statute *prohibited him from doing.* Here the suit is to get a state officer to do what a statute requires of him. The litigation is with *the officer, not* with the *state.*"

> *Rolston v. Missouri Fund Commrs.*, 120 U .S. 390, 411.

In the case at bar the suit was to restrain two *municipal corporations* and *their officers* from *violating* the *law* of the *state to the irreparable injury of* appellant.

A suit against an individual who is an officer, to restrain him from violating a statute of a state and thereby causing irreparable damage, is no more a suit against the state than one to restrain him from doing an act under a state statute which violates the Constitution of the United States. In neither case is the suit against the state. In each it is against the individual for his tortious act.

> *Allen v. Baltimore & Ohio R. R. Co.*, 114 U. S. 311;
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> *Board of Liquidation et al. v. McComb*, 92 U. S. 531, 541;
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> *Pennoyer v. McConnaughy*, 140 U. S. 1, 10;
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> *Clifford v. Miller*, 288 Fed. 537;

Weiland v. Pioneer Irrigation Co., 238 Fed. 519;

Ex parte Young, 209 U. S. 123;

Weyman-Bruton Co. v. Nash., 231 Fed. 898;

Bromwell B. & W. G. Co. v. State Board, 279 Fed. 440, 442, 443, 444;

Ludwig v. Western Union Tel. Co., 216 U. S. 146;

Western Union Tel. Co. v. Andrews, 216 U. S. 165;

Scott v. Donald, 165 U. S. 58, 67, 68-70;

In re Tyler, 149 U. S. 164;

Tyler v. Dane County, 289 Fed. 843, 847;

In re Ayers, 123 U. S. 443, 500, 501.

The fact that a portion of the taxes, if they should be collected from the street railway property, would be paid by the Sheriff to the County Treasurer and that the County Treasurer would be required to make a settlement with the State Treasurer, did not give the state any such interest in the litigation as to make the state a necessary party to the suit against the Sheriff and the County Treasurer to restrain them from committing tortious acts.

The law of the State of Washington recognizes the right of a mortgagee of property on which all taxes have been paid, to maintain a suit for an injunction to restrain the Sheriff from distraining the mort-

gaged property to satisfy taxes upon other property. The fact that the state may have an indirect interest in some of the taxes for which the Sheriff threatens distraint constitutes no obstacle in the way of the courts of Washington granting an injunction against the Sheriff to restrain such unlawful distraint. The state has no different interest in the taxes whether the suit to restrain the unlawful distraint of property for the collection of the taxes is brought in the state or in the federal court. In the State of Washington the state is not suable except in the Superior Court of Thurston County and then only by reason of a statute enacted pursuant to the Constitution of the state.

"The legislature shall direct by law in what manner and in what court suits may be brought against the state."

> Constitution of Washington, Article II, Section 26.

"Any person or corporation having any claim against the State of Washington, shall have the right to begin an action against the state in the Superior Court of Thurston County."

> Remington's Compiled Statutes of Washington, Section 886.

As jurisdiction of suits against the State of Washington may be exercised only by the Superior Court

of Thurston County, and as the Supreme Court of the state has recognized that suits to enjoin the collection of taxes may be maintained by a mortgagee where the distraint of the mortgaged property has been attempted for the collection of taxes for which the mortgaged property was not and other property was specifically assessed, it is plain that the indirect interest of the state in the amount to be collected for state purposes does not make the state a necessary party. If the interest of the state is not sufficient to prevent the exercise of jurisdiction of the Superior Court of a county other than Thurston, although suits upon claims against the state can be maintained in Thurston County only, such interest cannot be sufficient to prevent the exercise of jurisdiction in the federal court if the suit be brought therein instead of the state court when the state is not a party to such suit. That such suits may be maintained in the Superior Courts of counties other than Thurston, is established by the following decisions:

Goodsell v. Spokane County, 35 Washington Decisions 476, August 26th, 1925 (not yet officially reported);

Raymond v. King County, 117 Wash. 343;

Puyallup v. Lakin, 45 Wash. 368;

Pennington v. Yakima County, 127 Wash. 538, 540;

Scandinavian-American Bank v. King County, 92 Wash. 650;

Wilberg v. Yakima County, 132 Wash. 219, 220;

Mills v. Thurston County, 16 Wash. 378;

Minshull v. Douglas County, 234 Pacific R. 661, April 3, 1925 (not yet officially reported).

Under the cases just cited, it is clear that the act of the Sheriff in distraining the property covered by appellant's mortgage to collect taxes upon the street railway property, when the street railway property had been specifically assessed for the taxes thereon and the mortgaged property had not been assessed for the taxes upon the street railway property, was a tortious act.

In the very late case of *Goodsell v. Spokane County et al.*, 35 Washington Decisions 476, *supra*, not yet officially reported, the Supreme Court of Washington said:

"The purchaser takes all the assessed property. He must know that he is taking it subject to the taxes because he must know they have not been paid. Having taken all the property it is just that he pay all the taxes, provided enough of the original property can be distrained out of which the whole tax may be made. In this connection, it should be remembered that we have held that such a purchaser does not become personally liable for the tax. Since he takes all the property, he cannot have any dif-

ficulty in determining the amount of the tax. *Besides, as to him the assessment is in effect one on specific property.*" (P. 480.)

In the case at bar the city specifically assumed and agreed to pay such portion of the 1919 taxes upon the street railway property which the city purchased from the company as should be proportionate to the length of time during the year 1919 that the city was in possession of the street railway property and it was in possession of such property for three-fourths of that year. The taxes for which the Sheriff distrained the mortgaged property were taxes for which the street railway property was specifically assessed. The company not only offered to pay its portion of such taxes, but its offer to pay a very much larger portion of the taxes than was the share of the company was refused by the Sheriff. Appellant in its supplemental bill offered to pay any portion of such taxes which the company should pay if the company failed to pay the same. Notwithstanding such offers the Sheriff continued the advertisement of sale of the mortgaged property to satisfy the taxes upon the street railway property. The decision in the case last cited is in another respect applicable to this case:

"Inasmuch as the complaint shows that appellant has offered to pay his just portion of the tax and has tendered the same, there would be no justifica-

tion, under the facts pleaded, for a sale for any purpose of the property distrained." (P. 480.)

If, however, it be assumed that the interest of the state in the amount of the taxes to be collected was such an interest as would deprive the court of jurisdiction to determine the right to collect the state tax by the means which were taken, such assumed fact, if it existed, would not be sufficient to oust the court of jurisdiction to determine the controversy between appellant and the appellees as to the other taxes involved.

Port of Seattle v. Oregon & W. R. R. Co., 255 U. S. 56, 71;

Hopkins v. Clemson Agricultural College, 221 U. S. 636.

Ward v. Love County, 253 U. S. 17, 21, 22, 23;

Tyler v. Dane County, 289 Fed. 843, 847.

The District Court erred in treating the four separate and distinct taxes levied by separate bodies as one tax and in holding that the interest of the state in the one tax prevented exercise of jurisdiction by the court as a federal court in respect to the other taxes. (Specification 3.)

Illinois Central R. Co. v. Adams, 180 U. S. 28, 37;

Walter v. North Eastern R. Co., 147 U. S. 370, 374.

The principal of the city tax alone amounted to the sum of $179,365.76. (R. p. 3.) This tax was levied by the City of Seattle after the making of the contract with the company hereinbefore mentioned and after its acceptance of a deed conveying the street railway property.

Section 11319 of Remington's Compiled Statutes of Washington provides for the levy of a city tax by the City Council for the purpose of carrying on the city government. Section 11320 provides that the City Clerk shall certify a copy of the ordinance making the levy to the County Auditor or other proper officer.

Section 11321 makes the County Treasurer of each county in which there is a city of the first class *ex-officio* collector of city taxes for such city, requires him to execute in favor of the city a good and sufficient bond, the penal sum of which must be fixed by the City Council such bond to be approved by the Mayor of the city.

Section 1322 provides that all such city taxes collected shall belong to the city and the County Treasurer shall pay over all taxes collected during the previous month to the City Treasurer and shall render to the City Comptroller on or before the 10th day of each month between the first day of January

and the first day of May a statement of all taxes collected for the city.

Section 11323 provides that all taxes of such city assessed under the provisions of the chapter shall be collected and enforced by the same officers and in the same manner as delinquent county and state taxes are or may hereafter be collected and enforced.

The text of the sections referred to is set forth in the appendix to this brief.

The city tax was, therefore, a separate and distinct tax belonging to the city and the state had no interest whatsoever in such tax. The supposed interest of the state in the amount to be collected for state purposes could not deprive the court of jurisdiction to restrain the illegal collection of the city tax in which the state had no interest.

The bill alleged the existence of the several taxes and the supplemental bill alleged the refusal by the County Treasurer and by the Sheriff of the county to accept payment of the state tax with interest and costs, the county tax with interest and costs, the school district tax with interest and costs, unless the company would also pay the city tax with interest and costs. After the refusal of the county officers to allow the payment of the state, county and school district taxes with interest and costs the distraint

of the mortgaged property to pay the same taxes upon the street railway, together with the city tax, constituted the commission of a tort.

"Tender of the tax by anyone who has a right to make payment *is effectual to prevent a sale*, whether the tender is accepted or not, but a tender, in order to be effectual, must be of the full amount of *any single tax;* it cannot be of anything less, unless the statute makes provision for payment of a part by itself, as it does sometimes for the benefit of tenants in common or owners of distinct portions of the premises taxed. *But where different taxes are brought together for the purpose of a sale for all*, the taxpayer has *a right to pay any one separately*, and to *contest others*. If the owner of land or the holder of a lien thereon applies in good faith to the proper officer for the purpose of ascertaining the amount of the taxes and of paying the same, and is prevented by such officer's mistake, wrong, or fault, such attempt to pay is generally regarded as equivalent to payment."

Cooley on Taxation (3rd Ed.), page 808.

The tender of the state, county and school district taxes with interest and costs and the refusal of the county officers to accept the same rendered all of their subsequent acts illegal.

"It is well settled by many decisions of this court, that, for the purpose of affecting proceedings to enforce the payment of taxes, a lawful tender of payment *is equivalent to actual payment*, either being sufficient to deprive the collecting officer of all au-

thority for further action, and *making every subsequent step illegal and void.* (P. 282.) * * * The case, then, of the plaintiff below is reduced to this: He had paid the taxes demanded of him by a lawful tender. The defendant had *no authority of law thereafter to attempt to enforce other payment by seizing his property.* In doing so, he ceased to be an officer of the law, and became *a private wrong-doer.* It is the simple case in which the defendant, a natural private person, has unlawfully, with force and arms, seized, taken and detained the personal property of another. (P. 283.) * * * His tender, as we have already seen, was equivalent to payment so far as concerns the legality of all subsequent steps by the collector to enforce payment by distraint of his property. He has the right to say he will not pay the amount *a second time, even for the privilege of recovering it back.* And if he chooses to stand upon a lawful payment once made, he asks no remedy to recover back taxes illegally collected, but may resist the exaction, and treat as a wrong-doer the officer who seizes his property to enforce it." (P. 299.)

Poindexter v. Greenhow, 114 U. S. 270, 282, 283, 299;

Royal v. Virginia, 116 U. S. 572, 579;

United States v. Lee, 106 U. S. 196;

Atwood v. Weems, 99 U. S. 183;

Hills v. Exchange Bank, 105 U. S. 319;

Leet v. Armbuster, 143 Cal. 663;

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Bennett v. Hunter, 9 Wall. 326;

Tacey v. Irwin, 18 Wall. 549;

Helphrey v. Strobach, 13 Wash. 128;

Northern Pacific Ry. Co. v. Franklin County, 118 Wash. 117;

Livieratos v. Commonwealth Security Co., 57 Wash. 376;

Ward v. Thorndyke, 65 Wash. 11;

Weinberg v. Naher, 51 Wash. 591.

The supplemental bill alleged the distraint of the mortgaged property by the Sheriff after the institution of the suit and before the application for a temporary injunction could be heard. It sought to prevent the sale of the property distrained and to stop the continuance of the advertisement of sale. It alleged the willingness of appellant to pay any portion of the taxes upon the street railway property which the court should decree the company or appellant in equity should pay and it prayed that if in order to prevent the sacrifice of the mortgaged property it should be compelled to pay taxes which the city ought to pay, then it should be subrogated to the lien of those taxes upon the street railway property.

As the mortgaged property was distrained after the institution of the suit the taxing officials proceeded at their peril. The distraint of the mortgaged property to enforce payment of the taxes on the street railway property being a tortious act appellant was

entitled to an injunction restraining the paying over of the amount, if collected, to the county and city, or if a preliminary injunction should not be granted then to full relief upon the final hearing of the case.

Wingert v. First National Bank, 223 U. S. 670.

That appellant was entitled to subrogation is well settled by the decisions of the Supreme Court of the state and of this court:

Memphis Railroad v. Dow, 120 U. S. 287, 301, 302;

Dunsmuir v. Port Angeles Company, 30 Wash. 586, 593;

Childs v. Smith, 51 Wash. 457, 461;

Johnson v. Martin, 83 Wash. 375;

Packwood v. Briggs, 25 Wash. 530, 538;

Burgert v. Caroline, 31 Wash. 62, 66;

Moody v. Isselstein, 106 Wash. 294;

Netherlands-American Bank v. Grafke, 100 Wash. 188, 195;

Bollong v. Corman, 125 Wash. 441, 442;

University State Bank v. Steeves, 85 Wash. 59;

Murray v. O'Brien, 56 Wash. 361.

The question whether the four separate taxes could be so consolidated as to make them one tax and the question of the right of appellant to subrogation were

questions affecting the merits of the case. However such questions might be determined upon merits of the suit the District Court had federal jurisdiction to hear and determine them as the amount involved was sufficient and the requisite diversity of citizenship existed between the parties to the suit.

Illinois Central R. Co. v. Adams, 180 U. S. 28, 37.

It is, therefore, respectfully submitted that the decree appealed from should be reversed.

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